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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1938

No. 304

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

CHESTER N. WEAVER COMPANY (a corporation),
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Chester N. Weaver Company, in response to petition for writ of certiorari submits this brief in opposition to the granting of such a writ.

JURISDICTION.

Petitioner invokes jurisdiction under Section 240(a) of the Judicial Code (28 U.S.C. Sec. 347), but this Court has

uniformly declined to entertain jurisdiction under circumstances similar to those relied upon by petitioner.

RESTATEMENT OF QUESTION PRESENTED.

Is Section 23(r)(1) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) applicable to a single distribution in complete liquidation of the assets of an insolvent corporation to its "preferred stockholders"?

DENIAL OF PETITIONER'S REASONS FOR GRANTING WRIT.

Neither lack of uniformity of decision nor important question of public interest is here involved.

This Court holds that jurisdiction to bring up cases by certiorari from Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decision between *such Appellate Courts* in the several circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by a court of last resort. It was not conferred merely to give another hearing to the party defeated in the Circuit Court of Appeals.

Magnum Import Co. v. Houbigant, Inc., 262 U.S. 159, 163, 43 S. Ct. 531, 532;

Forsyth v. Hammond, 166 U.S. 506, 514-515, 17 S. Ct. 665, 668.

Petitioner asserts conflict of decision herein solely with that of the Court of Claims in *White v. United States*,

21 Fed. Supp. 361, and erroneous decision of "an important question of Federal law", as the sole reasons for granting the writ. (Pet. pp. 4-6.) Neither is tenable.

1. The Court of Claims is not an appellate court. It is, in some aspects, a mere fact-finding body for the Congress and various governmental departments. It is, at most, a trial court of limited jurisdiction. It cannot be classed with Circuit Courts of Appeals, which were created for the purpose of relieving this Court from an overburden of appellate work.

> *Forsyth v. Hammond,* 166 U.S. 506, 511-513, 17 S. Ct. 665, 667.

No decision by it can raise a conflict with a decision of a Circuit Court of Appeals, as "conflict" is used in this Court's rules and decisions. Section 23(r)(1) was not contained in the 1928 Act (involved in the *White* case), or in the 1934 Act (involved in the *Martin General Agency* case, cited on page 6 of petition).

On the question presented to this Court by petitioner (Pet., p. a) and as restated by respondent (*supra,* p. 2) there is no conflict with the decision in the *White* case. Section 23(r)(1) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) did not exist in the Revenue Act of 1928 (c. 852, 45 Stat. 791) which is involved in the *White* case and was abandoned by the Revenue Act of 1934 (c. 277, 48 Stat. 680). There is no parallel to Section 23(r)(1) in either the 1928 or 1934 Acts. As the statute of limitations has now run against all deficiencies arising under the 1932 Act and as there are no discoverable cases involving Section 23(r)(1) now pending hearing or decision before

either the Board of Tax Appeals or any of the Courts, it would appear that petitioner is attempting to resurrect a principle for consideration by this Court on alleged conflict with a now non-existent section of a statute.

As a conclusion to its plea for a writ on ground of conflict, respondent asserts that, because it believes a conflict to exist, it is not opposing petition for the certiorari in the *White* case. (Pet., p. 5.) The Government's consent or opposition to such petition will in no way influence this Court in the present proceeding.

It should be noted that the petition presents no Federal question in any way probably in conflict with applicable decisions of this Court.

2. There is no "important question" here presented. Petitioner has presented no other decision involving the identical question now before the Court and our research has revealed none. In the absence of such litigation and because actions under the 1932 Act are now barred it is impossible that there can be here presented a question of importance to the public.

Respondent seeks to inject a doubt upon the direct interpretation of Section 23(r)(1) of the 1932 Act by the Court below by injecting the question as to the proper scope of Section 112 of that Act and the Act of 1934. A reading of the opinion of the Court herein involved (R., p. 70) shows that the decision was based entirely upon an interpretation of Section 23(r)(1) and that respondent's injection of Section 112 of the Revenue Act of 1932 (c. 209, 47 Stat. 169) to enlarge the application of Section 23(r)(1) was cast aside.

As Section 101 of the Revenue Act of 1928 (c. 852, 45 Stat. 791), the interpretation of which is involved in the *White* case, and Section 117 of the Revenue Act of 1934 (c. 277, 48 Stat. 680), involved in the *Martin General Agency* case, are not the parallels of Section 23(r)(1) in any way and are not limited to specific classes of property nor discriminatory and restricted in the segregation of particular assets as in Section 23(r)(1), the "important question of Federal law" which petitioner seeks to have this Court settle in this case is moot. That important question can be settled as to living statutes in the *White* case, but should not be settled upon dead statutes in this case.

As no other case affecting the identical question involved in this proceeding has been presented by petitioner it would appear that no legal principle, the settlement of which would be of importance to the public, is herein involved. Hence the petition should be denied.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S. Ct. 422, 423.

3. We direct attention of the Court to the fact that petitioner does not urge or disclose any other reason contemplated by Rule 38-5(b) of this Court which would warrant the issuance of the writ sought.

ARGUMENT.

We restate the question before this Court to emphasize that there is no dividend involved, and that Section 23(r)(1), a *general* statute, deals only with *sales and*

exchanges as such, and not with liquidations, which have none of the qualities of sales or exchanges, and which are governed by the *specific* statute, Section 115(c). There is nothing in Section 115(c) to indicate that a liquidating distribution was intended to be treated as an exchange under Section 23(r)(1). The Circuit Court of Appeals properly held that the latter section was not applicable.

Section 23(r)(1) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) is a severely discriminatory provision, because it does not apply to non-capital assets other than stocks or bonds. It restricts deductions on "losses from sale or exchanges of stocks and bond * * * which are not capital assets * * * to the extent of the gains from such sales or exchanges". It appears that petitioner would contend that under this discriminatory provision, respondent, to deduct the loss suffered through the insolvency of the corporation in which he was a "preferred stockholder", should have gone into the market and gambled for gains on stocks and bonds to make sufficient profit to entitle him to a deduction. In other words, it interprets the above-quoted portion of Section 23(r)(1) to mean that receipt of a distribution on liquidation is exactly on equality under the law with a stock-market speculation. Such an interpretation is absurd.

With such a discriminatory provision and such an extended interpretation the Courts should seek the true intent, purpose and meaning of the statute before making a harsh and restricted interpretation. This was done by the minority of the Board of Tax Appeals in making their dissent and by the majority of the Court below by turning to the legislative history of the section in question.

(R., pp. 34, 36, 69.) Resort to legislative history frequently has been approved by this Court.

Helvering v. New York Trust Co., 292 U.S. 455, 464, 54 S. Ct. 806, 808.

The legislative history clearly discloses that Congress only intended to restrict deductions for losses on stocks and bonds from *actual* sales and exchanges. It so intended in order to eliminate a common method of tax avoidance by preventing owners of depreciated securities selling or exchanging the same at a loss and taking deductions on such losses against taxable gains from all other sources. Liquidation of corporations cannot be manipulated with sufficient ease to effect the tax evil which Congress sought to correct and, therefore, the statute should not be interpreted to go beyond the ordinary meaning of the words "sales and exchanges" used therein and the intent of Congress.

For brief legislative history see R., pp. 34-36;

Senate Report No. 665, 72nd Congress, 1st Session, p. 10;

H. R. Report No. 708, 72nd Congress, 1st Session, p. 12.

Section 23(r)(1) has come before the Courts in only one known and published instance and then only on a challenge of its constitutionality. In sustaining the constitutionality of the section, the Circuit Court of Appeals for the Seventh Circuit recognized the above-expressed legislative intent and held that the section was aimed only to prevent "speculative losses"—"losses from transactions which may often be but one form of gambling".

Davis v. United States, 87 Fed. (2d) 323, 325.

We respectfully submit that investment in a corporate enterprise, particularly in a corporation with few stockholders and unlisted issued stock, may not be interpreted as being "speculative" or a "form of gambling" as described in the legislative record or the above-cited Court decision. A loss sustained through the insolvency of a legitimate business corporation in the years of financial depression and the distribution of its assets, first, in full payment to its general creditors and, secondly, in insufficient payment to its next preferred creditors—its "preferred stockholders"—cannot be classified as a "gambling loss" or a "speculative loss" unless the Court believes that any person holding stock in any legitimate enterprise during a period of depression is, *per se*, a gambler and speculator.

In considering the above statement we ask the Court to appreciate the fact that, if the preferred stockholders had received nothing from the corporation, they would have been able to deduct the entire amount of their loss. This because the loss would not have resulted from a sale or exchange, but because the stock had become entirely worthless. This assertion has been accepted by the Government's representatives throughout the proceedings. The holders of the common stock, having received nothing on the liquidation, were permitted to deduct their full loss, although they suffered less financial loss than did respondent. We state this situation to emphasize the discriminatory character of Section 23(r)(1).

CONCLUSION.

The question of the meaning of Section 23(r)(1) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) here presented, as far as we have been able to ascertain through diligent inquiry and research, has never arisen before or been presented to the Board of Tax Appeals or any Court, except in these proceedings. Petitioner has failed to present the existence or pendency of any parallel. As Section 23(r)(1) was repealed by the Revenue Act of 1934 (c. 277, 48 Stat. 680), the probability is that no parallel will arise or, if presented, will be barred by limitation. Therefore, petitioner may not claim privilege of a writ because the decision of the Court below considered some legal principles which might be associated with the issue in question.

United States v. Rhuer, 220 U.S. 547, 31 S. Ct. 596.

We respectfully submit that petitioner herein is not entitled to have writ of certiorari issue and that its petition should be denied.

Dated, San Francisco, California,
September 14, 1938.

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Counsel for Respondent.